BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF LITTLE SPOKANE COMMUNITY CLUB, Appellant, vs. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent, HOWARD H. GATLIN, Intervenor.	PCHB No. 70-7 FINDINGS OF FACT, CONCLUSIONS AND ORDER

This matter is the appeal by the Little Spokane Community Club of Surface Water Permit No. 16229 (issued under Application No. 21149) granted to Howard H. Gatlin, intervenor, by the State of Washington, Department of Ecology, respondent. It came before the Pollution Control Hearings Board (Walt Woodward, hearing officer) at a formal hearing held in the Spokane County Courthouse, Spokane, Washington at 1:00 p.m., April 19, 1972, and continuing on April 20, 21 and 25, 1972.

Appellant appeared through Kermit Rudolf, intervenor through Joseph P. Delay and respondent through Charles W. Lean, assistant attorney general. Nora Fay Gasman, court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were offered and admitted. Counsel submitted briefs.

After reviewing the transcript, studying exhibits, considering the argument of counsel and after having considered Exceptions to its Proposed Order, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I.

The subject body of water, the Little Spokane River, is a non-navigable stream which flows in a southerly direction in Spokane County to a point some ten miles north of the City of Spokane, then swings wes where it joins the Spokane River. The portion of the Little Spokane River under consideration in this matter lies between the communities of Chattaroy on the north and Dartford on the south. Human use of this section of the river has undergone a gradual metamorphosis from an earlier and almost exclusive condition of farming, dairying and cattle raising to the present and predominant establishment of suburban homes.

II.

Howard H. Gatlin, intervenor in this matter, is the owner of a 200-acre tract near the western side of the Little Spokane River at Buckeye, a point much closer to Chattaroy than to Dartford. In 1968, he began to pump water from the Little Spokane River to his non-riparian acreage for sprinkler irrigation of alfalfa as feed for cattle. On August 9, 1968 he filed application for a water appropriation permit of 2.8 cubic feet

per second (cfs) with the then State of Washington, Department of Water Resources, a predecessor agency to respondent. After receiving a complaint from appellant, the Department of Water Resources conducted a field examination on August 28, 1968. Intervenor complied with an order of the Department to cease pumping until he had obtained a permit. On July 29, 1970, respondent approved a finding that "water is available for appropriation for a beneficial use" to the amount of 2.0 cfs, and that this appropriation "will not impair existing rights or be detrimental to the public welfare."

III.

Respondent, noting in its finding of July 29, 1970, that 48 protests were on file opposing the Gatlin withdrawal, notified appellant, whose membership included most of the protesters, of the finding on July 30, 1970. On August 27, 1970, appellant protested the withdrawal in a letter to respondent. On September 11, 1970, respondent granted intervenor Surface Water Permit No. 16229 in accordance with the terms specified in respondent's finding of July 29, 1970. On September 14, 1970, intervenor began construction of his water system and subsequently withdrew water from the Little Spokane River under terms of Permit No. 16229. On September 15, 1970, the members of the Pollution Control Hearings Board, a newly created state agency, were sworn into office. On November 4, 1970, the Pollution Control Hearings Board advised respondent that appellant's letter of August 27, 1970 constituted a "timely protest" for purposes of this appeal.

IV.

At least 68 acres of intervenor's non-riparian acres are irrigable.

V.

There is no proof in the record that intervenor's irrigation under Permit No. 16229 is a profitable enterprise.

VI.

Intervenor's withdrawal of water under Permit No. 16229 reduces the amount of water flowing downstream from the point of withdrawal from two to four percent during dry spell, low-water periods.

VII.

During 1968, the lowest flow year of record in the 1960 decade, the Little Spokane River was flowing at 92 cfs during the lowest period of that year at the gaging station at Dartford, several miles downstream from the point of intervenor's withdrawal. Between the point of withdrawal and Dartford, at least two tributary streams enter the Little Spokane River. The Little Spokane River, at the point of intervenor's withdrawal, contains about 80 percent of the volume of water registered at the Dartford gaging station.

VIII.

Starting in the summer of 1968 and continuing from that time, riparian residents of the Little Spokane River downstream from intervenor's point of withdrawal noticed several critical changes in the river flow past their properties. These included insufficient water for their accustomed pursuits of swimming, diving, boating, canoeing and river floating, and a necessity to move water pumps further out into the stream.

IX.

Any lowering of the volume of water in the Little Spokane River

flowing past Pine View Park, a major facility of the Spokane County Park Department located downstream from intervenor's point of water withdrawal, has a deleterious effect on the public's use and enjoyment of that park.

X.

Respondent, while conceding in its finding of July 29, 1970 that the river's "value to the public for its recreational and esthetic benefits should not be underestimated nor undermined," made no detailed field investigation of appellant's protests.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS

I.

Before considering the specifics of this matter, the Pollution Control Hearings Board first takes note of a gradual change over the years relative to the accepted uses of public waters. Riparian rights, once paramount, gave way in the arid West to the doctrine of non-riparian appropriation for beneficial use. More recently there has been a recognition that esthetic and recreational uses of public water are as important as earlier, historical rights of irrigation. Riparian rights for recreational purposes on non-navigable lakes have been recognized in decisions of the State Supreme Court and it may be reasonable to assume that the court some day may also apply this doctrine to non-navigable streams. In any event, the Water Resources Act of 1971, stating that public waters of the state are to be "protected and fully utilized for the greatest benefit to the people," includes use of water

for "recreational" purposes and "preservation of environmental and esthetic values" among its "general declarations of fundamentals."

II.

In the instant matter there appears to be a classic example of this gradual change in acceptable uses of public water bodies. Once a farming region dependent to a great extent on irrigated water removed from the Little Spokane River, the area between Chattaroy and Dartford today--intervenor's non-riparian acreage being an exception--is almost entirely devoted to the development of river bank and upland "country living" homesites. The Little Spokane River has changed from an agricultural stream to a residential brook but respondent, in its field examinations and consideration of intervenor's application, took no more notice of this basic change in the use of the Little Spokane River than to make a cursory acknowledgment in its finding that "irrigation and esthetic benefits should not be . . . undermined." It well could be asked, therefore, what agency of the state government is to prevent such undermining if not respondent? Respondent cannot shirk its responsibility for establishing minimum flows by saying that a "specific flow necessary for recreational and esthetic purposes has not been made." Is the Little Spokane River, now primarily a residential brook, to be drained dry by irrigation withdrawals simply because respondent has not gotten around to making a minimum flow study? We think not.

III.

We attach no great significance to the apparent discrepancies between the Dartford gaging station records and the testimony of appellant's witnesses as to the level of the river flowing past their

properties. The important consideration is not the measured volume of water still flowing in certain deep channels; the critical consideration is the fact that, since 1968, riparian residents have found that the river, which once lapped their shores, has receded so much that they are prevented from accustomed aquatic pursuits. There is no proof that intervenor's withdrawal caused this change in the river flow. In our view, none is needed. The fault lies in respondent's failure to recognize that the general condition of the river, from whatever cause, had deteriorated to the detriment of riparian residents and to general citizens' use and enjoyment of a large public park. We conclude, therefore, that respondent erred in finding (1) that there was water available for appropriation, and (2) that intervenor's appropriation is not detrimental to the public interest.

IV.

The third criterion by which respondent must test every surface water application is whether there is a beneficial use. Certainly, intervenor's stated objective of growing alfalfa for cattle raising is a beneficial one. Intervenor, although invited to do so, did not furnish proof that his enterprise is a profitable one. He failed to produce evidence at the hearing to sustain his claim that it is profitable. He was given a post-hearing opportunity to show by his financial records that his project is profitable and therefore, a beneficial use which does not waste his appropriated water. He has failed to make such post-hearing proof. We must conclude, therefore, that there is doubt as to the beneficial use to which intervenor is putting his appropriated water.

V.

We come now to the curious set of circumstances surrounding this appeal. The Pollution Control Hearings Board always has recognized that appellant's letter to respondent of August 27, 1970 was a timely appeal to this Board. This has been tested twice in court and the Pollution Control Hearings Board's position has been twice sustained. This, however, cannot be taken as an implied criticism of respondent for granting a permit which later became the subject of appeal. There were mitigating circumstances surrounding the establishment of the Pollution Control Hearings Board. Accepted procedures and lines of communication had not been well established during the period when the permit was granted and the appeal was recognized. By the same token, intervenor cannot be condemned for constructing a water withdrawal system after being granted the permit and while this appeal was moving to the stage of formal hearing. We are inclined to grant the appeal in toto, but we feel our judgment must be tempered with a recognition of the obvious good faith of respondent during the confused period of organization during which the appeal was accepted. Our judgment also must recognize the legal right of intervenor to test the validity of the acceptance of the appeal by the Pollution Control Hearings Board.

VI.

The applicable law at the time of this application was RCW 90.03.290 which directs that the Department shall reject an application if

". . . the proposed use . . . threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, . . ."

We do not know what evidence the Department considered in reaching its conclusion in approving the proposed use of 2.0 cfs for a marginal irrigation project, but the evidence before this Board on this appeal established conclusively that the proposed use would be detrimental to an already imperiled public interest in the lower reaches of the Little Spokane River, which the Legislature by its 1971 enactment (somewhat belatedly) moved to protect.

We do not impugn the motives of the Department of Ecology in granting this permit to the intervenor, Howard A. Gatlin. On this appeal we have had the advantage of considerable evidence not before the Department, as to the character and the extent of the public interest in the Little Spokane River below the point of the intervenor's diversion.

The evidence before us establishes that the diversion would be, and was, detrimental to the public interest, having due regard to the highest feasible use of the water belonging to the public.

In view of these Conclusions, the Pollution Control Hearings Board makes this

ORDER

Permit No. 16229 is remanded to respondent for modification as

follows:

1. Flow meters shall be installed at both the river pumping station and the spring diversion; such meters shall be capable of measuring the instantaneous rate of diversion as well as the total volume of water pumped over any irrigation season.

2. Intervenor is to be permitted to withdraw water from the Little Spokane River for the irrigation of 68 acres, not to exceed 570 g.p.m. and 235 acre-feet per year, less the amount of water which respondent finds is available from intervenor's spring, said modified permit to remain in force until such time as the results of a minimum flow study by respondent has been made, at which time said permit will be subject to that minimum flow as is established.

3. At such time as certificate of water right might issue under Permit No. 16229, respondent shall reduce the quantities of water appropriated if the flow measurement readings find a lesser quantity of water is needed than as are identified in (2) above.

DONE at Olympia, Washington this 2nd day of January, 1973.

POLLUTION CONTROL HEARINGS BOARD

WALT WOODWARD, Chairman

MATTHEW W. HILL, Member

JAMES T. SHEEHY, Member